

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

OCT 31 2019

Re: FOIA No. FY19-80
Final Response

VIA E-MAIL AND REGULAR MAIL

Emma Best
MuckRock News
DEPT MR 73728
411A Highland Ave.
Somerville, MA 02144-2516
73728-41167949@requests.muckrock.com

Dear Ms. Best:

This is a response to your correspondence of May 29, 2019, in which you requested information pursuant to the Freedom of Information Act (FOIA),¹ and the Federal Energy Regulatory Commission's (Commission) FOIA regulations, 18 C.F.R. § 388.108 (2019). Specifically, you requested all documents in the agency's possession that pertain to the WikiLeaks website or organization from January 2006 to the date of this request including, but not limited to, emails, memos, notes, briefings, reports and other documents related to, mentioning or generated as a result of:

- (1) Guidance and instructions for employees regarding visiting the website otherwise reading or learning about it in the news;
- (2) Internal reactions to the website's existence and disclosures;
- (3) Damage reports regarding the website and its disclosures;
- (4) Efforts to identify, investigate and/or mitigate potential leaks to the website; and
- (5) Efforts to identify, investigate and/or mitigate potential unauthorized viewing of the website or news reports analyzing it and/or its contents.²

On July 15, 2019, the Director of the Office of External Affairs issued a determination regarding 31 responsive documents, releasing 19 in their entirety and 12

¹ 5 U.S.C. § 552, *as amended by* the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).

² Per correspondence with the Commission, on May 27, 2019, you agreed to narrow the scope of this request to be limited to the Office of the Executive Director.

with redactions pursuant to FOIA Exemption 6.³ On July 17, 2019 you agreed to narrow your request to exclude subscription emails, and based on the new search terms, Commission staff identified 20 additional documents. Of the 20 additional documents 16 documents will be withheld in their entirety based on FOIA Exemption 5.⁴ The remaining four documents are released with redactions to the names and contact information of lower-level Commission personnel pursuant to FOIA Exemption 6.

FOIA Exemption 5 protects from disclosure “inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency.” More specifically, FOIA Exemption 5 incorporates various privileges, including the deliberative process privilege, which is at issue here. Courts have consistently held that three policy purposes constitute the basis for the FOIA Exemption 5 deliberative process privilege: (1) to encourage open, frank discussions on matters of proposed policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency’s action. *See Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *see also Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1972) (recognizing that “[i]t would be impossible to have any frank discussions of legal or policy matters in writing if all such writings were to be subjected to public scrutiny”).

Here, the 16 withheld e-mails are either internal deliberations between FERC staff (inter-agency) or discussions between FERC and other qualifying federal agencies (intra-agency). Not only would release of the documents risk chilling future staff discussion on such matters, it could cause public confusion by disclosing analyses that ultimately did not form part of the final agency analysis released to the public. As such, 16 documents are being withheld in their entirety.

The four remaining documents are enclosed. As provided by the FOIA and 18 C.F.R. §388.110(a)(1) of the Commission’s regulations, any appeal from this determination must be filed within 90 days of the date of this letter. The appeal must be in writing, addressed to James P. Danly, General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, and clearly marked “Freedom of Information Act Appeal.” Please include a copy to Charles A. Beamon, Associate General Counsel, General and Administrative Law, at the same address.

³ 5 U.S.C. § 552(b)(6) (protecting from disclosure files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy).

⁴ 5 U.S.C. § 552(b)(5) (protecting inter-agency or intra-agency memoranda).

You have the right to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue your appeal. You may contact OGIS by email at ogis@nara.gov; telephone at (877) 684-6448; facsimile at (301) 837-0348; or by mail to the Office of Government Information Services, National Archives and Records Administration, Room 2510, Adelphi Road, College Park, MD 20740-6001.

Sincerely,

A handwritten signature in black ink, appearing to read "Leonard M. Tao", with a stylized flourish at the end. Below the signature, the letters "for" are handwritten.

Leonard M. Tao
Director
Office of External Affairs

Enclosures (4)



Fwd: FW: DOE No Comment Policy

Wed, Feb 12, 2014 at 4:01 PM

To: [REDACTED]

Cc: [REDACTED]

Forwarding 1 of 5.

----- Forwarded message -----

From: [REDACTED]

Date: Tue, Feb 11, 2014 at 4:46 PM

Subject: FW: DOE No Comment Policy

To: [REDACTED]

[for FOIA request consideration]

From: [REDACTED]

Sent: Tuesday, December 07, 2010 1:26 PM

To: ER-3

Cc: Tod Henby

Subject: DOE No Comment Policy

FYI about the DOE GEN-16, "No Comment Policy for Classified Areas", I have attached below DOE staff briefing about the "No Comment" policy and a link to a classification bulletin about that policy (bottom of page 6). Essentially, when being asked about the sensitive information in the public domain, we should simply reply with "no comment".

[REDACTED]

<<...>>

<http://www.hss.doe.gov/classification/news/CommuniQue200508.pdf>

From: [REDACTED]

Sent: Tuesday, December 07, 2010 12:09 PM

To: ER-3

Subject: Beware - WikiLeaks

Team,

I'm sure all of you have been following the WikiLeaks story in the media as it

unfolds. The article below reminds feds to not view materials posted by WikiLeaks while on government or personal computers because the materials remain classified. I hadn't seen anything from our own Security Office on this yet, but figured I would share the article.

http://www.nextgov.com/nextgov/ng_20101206_5274.php?oref=rss?zone=NGtoday



Federal Energy Regulatory Commission
202-502-6826

NOTE: All information contained in the above e-mail should be considered "DRAFT - WORKING PAPERS" unless specifically stated otherwise and is not for public release. This message and any attachments are intended only for the use of the addressee and may contain information that is privileged and confidential. If the reader of the message is not the intended recipient or an authorized representative of the intended recipient, you are hereby notified that any dissemination of this communication is strictly prohibited. If you have received this communication in error, notify the sender immediately by return email and delete the message and any attachments from your system.



GEN16.ppt
366K

Classification Bulletin

GEN-16

**“No Comment Policy for
Classified Areas”**



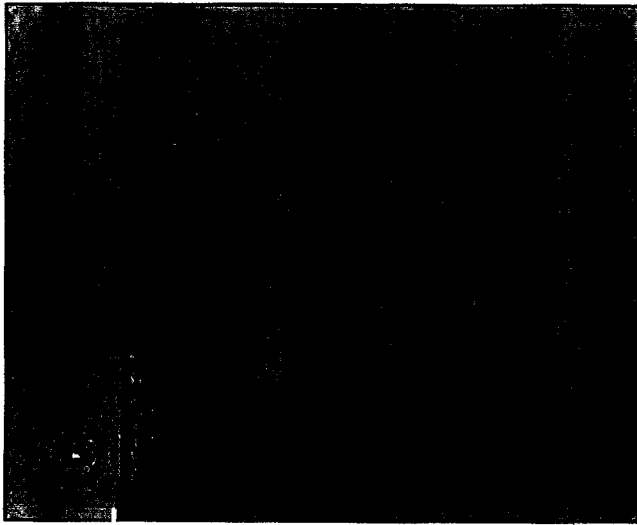
June 30, 2005

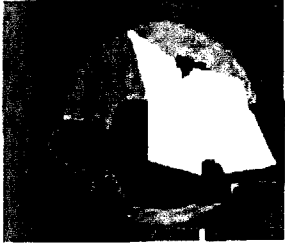
**Lesley Nelson-Burns
Policy and Quality Management Division**

“No Comment” Policy

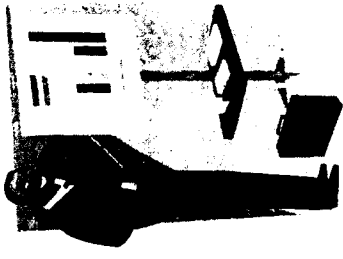
- **“No Comment” Policy Review**
- **Issues with the “No Comment” Policy**
- **The Scope of the Problem**
- **Possible Solutions**
- **Discussion**

“No Comment” Policy

- 
- October 1, 1986
 - Applies to RD, FRD, and NSI
 - Applies to:
 - Classified information
 - Appearing in public domain
 - Information in classified subject areas
 - Submitted to DOE for review by
uncleared persons
 - In spoken communications

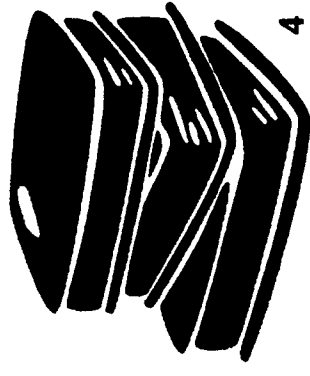


Public Domain



- In newspapers, magazines, websites, books, speeches, TV, etc.
- No comment on accuracy, classification, or technical merit of ***classified information***
- Fact of appearance of classified information is classified at same level and category as the information

Appearance in the public domain does not declassify the information



Documents Submitted for Review

- In a *classified subject area*
 - By individuals without a clearance
 - No comment on accuracy, classification, or technical merit of documents
 - Evaluation by DOE is classified at level and category necessary, but no less than CNSI



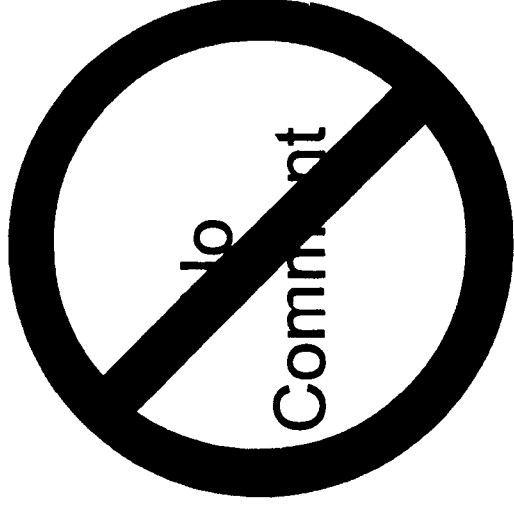
Spoken Communications

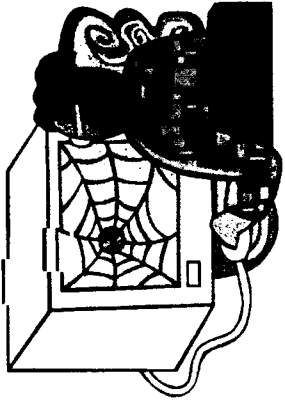


- Interviews, conversations, speeches, etc. *in classified subject areas*
 - Should be familiar with classification guidance for subject area and the “No Comment” policy
 - Use discretion to avoid using “no comment” so that its use implies or reveals classified information

Exceptions

- Made in consultation with and concurrence of appropriate HQ program director and Director, OCIC.
- Comment on unclassified portions of a document that contains classified information
- But make clear comment in no way implies an endorsement of the “overall accuracy, technical merit, or content of other aspects of the document”





Problem One

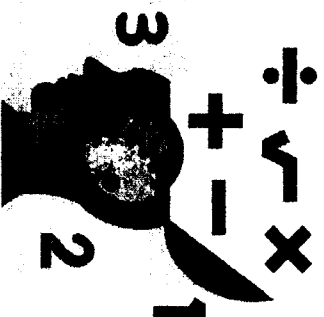
What is Comment?



- Surfing/downloads from a website that contains classified information?
- Sending an e-mail of a public domain source that contains classified information?
- Citation of a public domain source that contains classified information in a bibliography or footnote?
 - In subject areas of interest, does use by DOE employee imply it contains classified?
 - Footnote with page number of page with unclassified information – page may also contain classified information?
 - It may draw more attention to an authoritative source if it is NOT cited

Problem Two

If in Public Domain, “No Comment” if classified



Public Domain + “No Comment” = **CLASSIFIED**

Inconsistency One

Public Domain

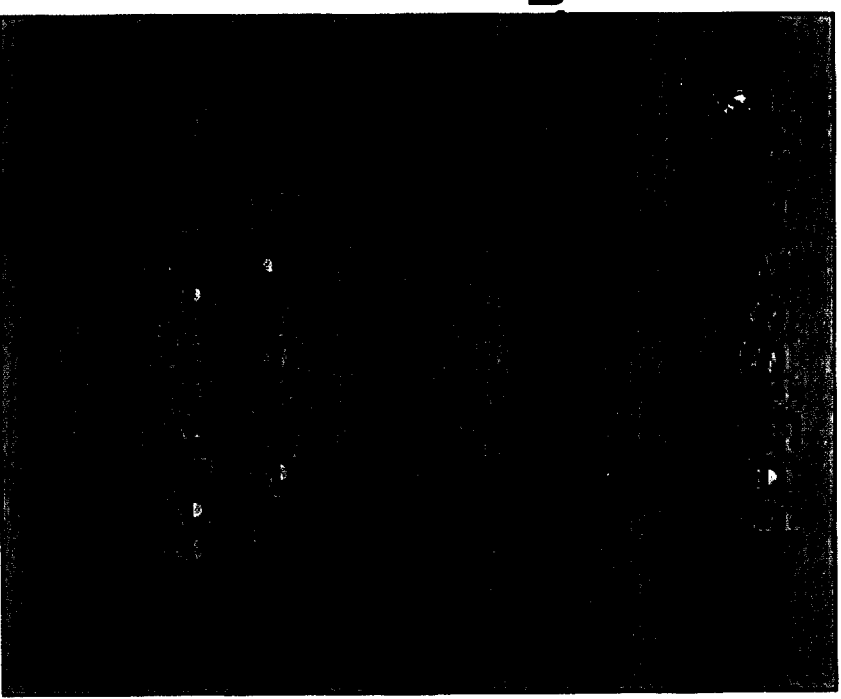


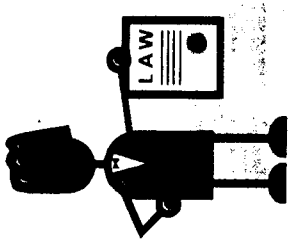
Submitted documents

not consistent



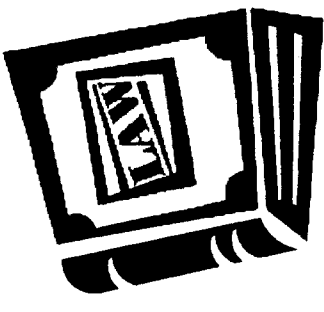
Spoken communication



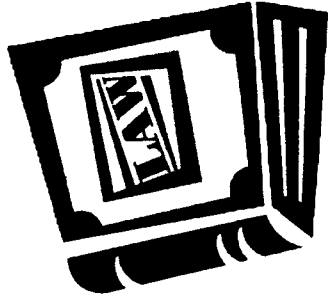


Inconsistency Two

10 CFR 1045.22

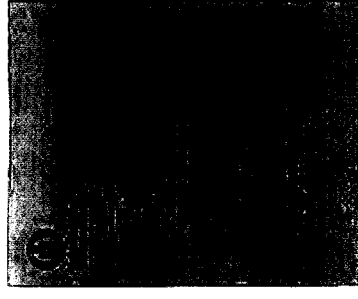


- “ a) Authorized holders of RD and FRD shall not confirm or expand on the classification status or technical accuracy of **classified information** in the public domain.
- b) Unauthorized disclosure of classified information does not automatically result in the declassification of that information.
- c) If the disclosure of classified information is sufficiently authoritative or credible, the DOE Director of Security Affairs shall examine the possibility of declassification.”



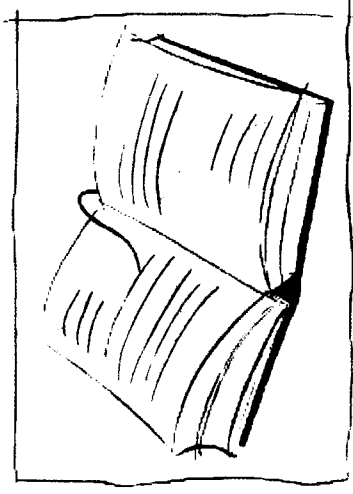
Inconsistency Two

CFR vs GEN-16

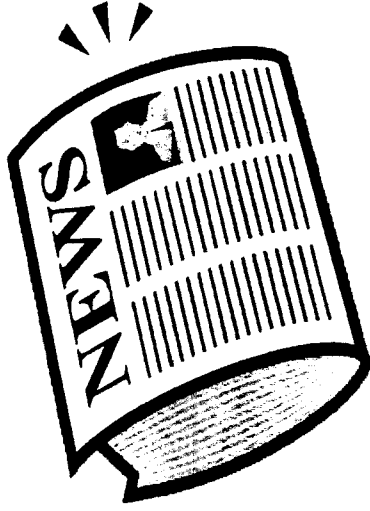


- 10 CFR 1045.22 and GEN-16
 - No comment on accuracy, classification, or technical merit of **classified information**
- GEN-16 continued
 - Comment on **unclassified portions** of a document that contains classified information made in consultation with and with the concurrence of the appropriate HQ program manager and the Director, OCIC.

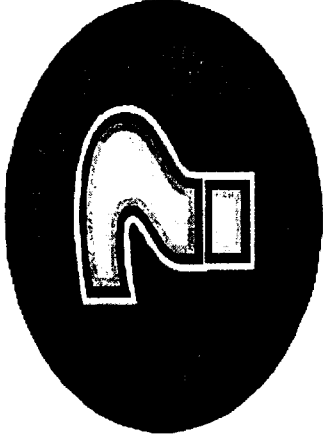
The Scope of the Problem



- Increasing amount of classified information in the public domain
- Increasing accessibility to classified information in the public domain



Websites
Newspapers
Magazines
Books



What to do?

- Fine tune the “No Comment” policy?
 - Define “comment”
 - Address e-mails, downloads
 - Address citations
- Documents submitted for review
 - Develop procedures for with clearance/without clearance
 - Permit local flexibility?
- Comment = Compromise
 - Revoke clearances if violators with a clearance knowingly violate the “No Comment” Policy?

“No Comment” Review

Current Policy

	Public Domain	Submitted for Review	Spoken Communications
Applies to classified subject area	N/A	GEN-16	GEN-16
Applies only to classified information	GEN-16	N/A	N/A
No comment on classification status	GEN-16	GEN-16	N/A
No comment on <u>classified</u> content	GEN-16	N/A	N/A
No comment on <u>any</u> content	N/A	GEN-16	N/A

“No Comment” Policy

Changes?

	Public Domain	Submitted for Review	Spoken Communications
Allow comment on classification status at the portion level?	NO	NO	NO
Allow comment on classification status at the document level?	No?	No?	No?
Allow <u>unclassified</u> comment on <u>unclassified</u> content?	?	?	Yes
Allow <u>unclassified</u> comment on <u>classified</u> content?	Too difficult?	Too difficult?	No?

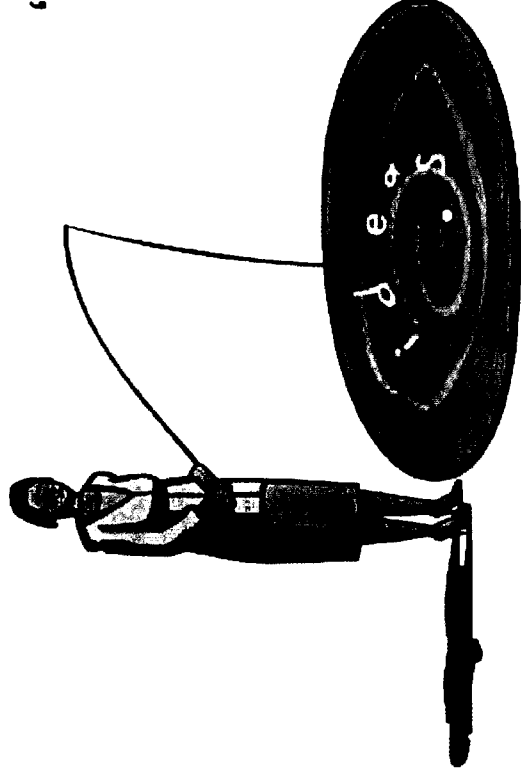
Your Thoughts

- Does the “No Comment” policy work?



- Should we change the “No Comment” Policy?

- How should we change it?



From: [REDACTED]
To: ER-3
Subject: Beware - WikiLeaks
Date: Tuesday, December 07, 2010 12:09:30 PM

Team,

I'm sure all of you have been following the WikiLeaks story in the media as it unfolds. The article below reminds feds to not view materials posted by WikiLeaks while on government or personal computers because the materials remain classified. I hadn't seen anything from our own Security Office on this yet, but figured I would share the article.

http://www.nextgov.com/nextgov/ng_20101206_5274.php?oref=rss?zone=NGtoday

[REDACTED]
Federal Energy Regulatory Commission
202-502-6826

NOTE: All information contained in the above e-mail should be considered "DRAFT - WORKING PAPERS" unless specifically stated otherwise and is not for public release. This message and any attachments are intended only for the use of the addressee and may contain information that is privileged and confidential. If the reader of the message is not the intended recipient or an authorized representative of the intended recipient, you are hereby notified that any dissemination of this communication is strictly prohibited. If you have received this communication in error, notify the sender immediately by return email and delete the message and any attachments from your system.

From: [REDACTED]
To: ER-3
Cc: [Tod Henby](#)
Subject: DOE No Comment Policy
Date: Tuesday, December 07, 2010 1:26:21 PM
Attachments: [GEN16.ppt](#)

FYI about the DOE GEN-16, "No Comment Policy for Classified Areas", I have attached below DOE staff briefing about the "No Comment" policy and a link to a classification bulletin about that policy (bottom of page 6). Essentially, when being asked about the sensitive information in the public domain, we should simply reply with "no comment".

[REDACTED]

<http://www.hss.doe.gov/classification/news/CommuniQue200508.pdf>

From: [REDACTED]
Sent: Tuesday, December 07, 2010 12:09 PM
To: ER-3
Subject: Beware - WikiLeaks

Team,

I'm sure all of you have been following the WikiLeaks story in the media as it unfolds. The article below reminds feds to not view materials posted by WikiLeaks while on government or personal computers because the materials remain classified. I hadn't seen anything from our own Security Office on this yet, but figured I would share the article.

http://www.nextgov.com/nextgov/ng_20101206_5274.php?oref=rss?zone=NGtoday

[REDACTED]
Federal Energy Regulatory Commission
202-502-6826

NOTE: All information contained in the above e-mail should be considered "DRAFT - WORKING PAPERS" unless specifically stated otherwise and is not for public release. This message and any attachments are intended only for the use of the addressee and may contain information that is privileged and confidential. If the reader of the message is not the intended recipient or an authorized representative of the intended recipient, you are hereby notified that any dissemination of this communication is strictly prohibited. If you have received this communication in error, notify the sender immediately by return email and delete the message and any attachments from your system.

From: [REDACTED]
Subject: FW: for your info., OMB issues Memoranda on: (1) Mishandling of Classified Information, and (2) Plain Writing Act of 2010
Date: Monday, November 29, 2010 10:16:15 AM

f.y.i.

From: [REDACTED]
Sent: Monday, November 29, 2010 10:14 AM
To: [REDACTED] Isaac Hernandez; Charles Beamon
Cc: [REDACTED]
Subject: for your info., OMB issues Memoranda on: (1) Mishandling of Classified Information, and (2) Plain Writing Act of 2010

[REDACTED] alerted us to recent OMB memoranda and guidance on: (1) Mishandling of Classified Information, and (2) Plain Writing Act of 2010. The links follow:

[M-11-06, WikiLeaks - Mishandling of Classified Information](#) (November 28, 2010)
(1 page, 56 kb)

[M-11-05, Preliminary Guidance for the Plain Writing Act of 2010](#) (November 22, 2010)
(3 pages, 62 kb)

[On 10/13/10, the President signed the Plain Writing Act of 2010, to promote "clear Government communication that the public can understand and use."]

[Thanks, [REDACTED]]

FOIA-2019-80
Accepted: May 31, 2019
Track 3
Due Date: June 28, 2019

From: 73728-41167949@requests.muckrock.com <73728-41167949@requests.muckrock.com>
Sent: Monday, May 27, 2019 6:15 PM
To: FOIA-CEII
Cc: FOIA-CEII
Subject: RE: Freedom of Information Act Request: WikiLeaks (Federal Energy Regulatory Commission)

Federal Energy Regulatory Commission
FOIA Office
888 First Street Northeast
Washington, DC 20426

May 27, 2019

This is a follow up to a previous request:

You may limit the request to the office you suggest. Thank you for your helpful suggestion.

(Note: Per FOIA office recommendation: This requester agreed to narrow the scope of this request to the Office of the Executive Director. This office provides administrative support services to the Commission including information technology, organizational management and other functions).

Filed via MuckRock.com
E-mail (Preferred): 73728-41167949@requests.muckrock.com
Upload documents directly:

https://accounts.muckrock.com/accounts/login/?url_auth_token=AAAawYQJctRkvxj5UXjeYM6dEM4%3A1hVNsx%3Ak9BVzmN49CcmIivnx8ZWAYrhg_o&next=https%3A%2F%2Fwww.muckrock.com%2Faccounts%2Flogin%2F%3Fnext%3D%252Faccounts%252Fagency_login%252Ffederal-energy-regulatory-commission-206%252Fwikileaks-federal-energy-regulatory-commission-73728%252F%253Femail%253DFOIA-CEII%252540ferc.gov

Is this email coming to the wrong contact? Something else wrong? Use the above link to let us know.

For mailed responses, please address (see note):

MuckRock News

DEPT MR 73728

411A Highland Ave

Somerville, MA 02144-2516

PLEASE NOTE: This request is not filed by a MuckRock staff member, but is being sent through MuckRock by the above in order to better track, share, and manage public records requests. Also note that improperly addressed (i.e., with the requester's name rather than "MuckRock News" and the department number) requests might be returned as undeliverable.

On May 20, 2019:

To Whom It May Concern:

Pursuant to the Freedom of Information Act, I hereby request the following records:

I seek any and all documents in the agency's possession that pertain to the WikiLeaks website or organization from January 2006 to the present date, including but not limited to emails, memos, notes, briefings, reports and other documents related to, mentioning or generated as a result of:

- * guidance and instructions for employees regarding visiting the website or otherwise reading or learning about it in the news
- * internal reactions to the website's existence and disclosures
- * damage reports regarding the website and its disclosures
- * efforts to identify, investigate and/or mitigate potential leaks to the website

- * efforts to identify, investigate and/or mitigate potential unauthorized viewing of the website or news reports analyzing it and/or its contents

The requested documents will be made available to the general public, and this request is not being made for commercial purposes.

In the event that there are fees, I would be grateful if you would inform me of the total charges in advance of fulfilling my request. I would prefer the request filled electronically, by e-mail attachment if available or CD-ROM if not.

Thank you in advance for your anticipated cooperation in this matter. I look forward to receiving your response to this request within 20 business days, as the statute requires.

Sincerely,

Emma Best

Filed via MuckRock.com

E-mail (Preferred): 73728-41167949@requests.muckrock.com

Upload documents directly:

https://accounts.muckrock.com/accounts/login/?url_auth_token=AAAawyQJctRkvxj5UXjeYM6dEM4%3A1hVNsx%3Ak9BVzmN49CcmIIvnx8ZWAYrhg_o&next=https%3A%2F%2Fwww.muckrock.com%2Faccounts%2Flogin%2F%3Fnext%3D%252Faccounts%252Fagency_login%252Ffederal-energy-regulatory-commission-206%252Fwikileaks-federal-energy-regulatory-commission-73728%252F%253Femail%253DFOIA-CEII%252540ferc.gov

Is this email coming to the wrong contact? Something else wrong? Use the above link to let us know.

For mailed responses, please address (see note):

MuckRock News

DEPT MR 73728

411A Highland Ave

Somerville, MA 02144-2516

PLEASE NOTE: This request is not filed by a MuckRock staff member, but is being sent through MuckRock by the above in order to better track, share, and manage public records requests. Also note that improperly addressed (i.e., with the requester's name rather than "MuckRock News" and the department number) requests might be returned as undeliverable.

I am a member of the news media and request classification as such. I have previously written about the government and its activities, with some reaching over 100,000 readers in outlets such as Gizmodo, MuckRock, Motherboard, Property of the People, AND Magazine, Unicorn Riot, and more. As such, as I have a reasonable expectation of publication and my editorial and writing skills are well established. In addition, I discuss and comment on the files online and make them available through non-profits such as the library Internet Archive and and the journalist non-profit, MuckRock, disseminating them to a large audience. While my research is not limited to this, a great deal of it, including this, focuses on the activities and attitudes of the government itself. As such, it is not necessary for me to demonstrate the relevance of this particular subject in advance.

Additionally, case law states that "proof of the ability to disseminate the released information to a broad cross- section of the public is not required." *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004); see *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 814-15 (2d Cir. 1994). Further, courts have held that "qualified because it also had "firm" plans to "publish a number of . . . 'document sets'" concerning United States foreign and national security policy." Under this criteria, as well, I qualify as a member of the news media.

Additionally, courts have held that the news media status "focuses on the nature of the requester, not its request. The provision requires that the request be "made by" a representative of the news media. Id. § 552(a)(4)(A)(ii)(II). A newspaper reporter, for example, is a representative of the news media regardless of how much interest there is in the story for which he or she is requesting information." As such, the details of the request itself are moot for the purposes of determining the appropriate fee category.

As my primary purpose is to inform about government activities by reporting on it and making the raw data available, I request that fees be waived.

